

Follow-up Information on the Implementation of the Views of 21 July 2017

concerning the Communication

No. 2170/2012 *Neupane v. Nepal*

1. On 21 July 2017, the Human Rights Committee issued its Views on the above-mentioned case, finding that the State party violated Arts. 6, 7, 9 and 16, of the International Covenant on Civil and Political Rights (hereinafter “the Covenant”); and Art. 2, para. 3, read in conjunction with Arts. 6, 7, 9 and 16 of the Covenant with regard to Mr. Danda Pani Neupane. The Committee also declared a violation of Art. 7, read alone and in conjunction with Art. 2, para. 3, with regard to the authors of the communication. Ms. Shanta Neupane and Ms. Nisha Neupane were notified about the adoption of the Views on 14 August 2017.
2. In accordance with Art. 2, para. 3, of the Covenant, the Human Rights Committee declared that Nepal is under an obligation to provide the authors with an effective remedy including:
 - Conduct a **thorough and effective investigation** into the enforced disappearance of Mr. Neupane and provide the authors with detailed information about the results of its investigation.
 - If Mr. Neupane is dead, **locate his remains and hand them over** to his family.
 - **Prosecute, try and punish** those responsible for the violations committed and make the results of such measures public.
 - Ensure that any necessary and adequate **psychological rehabilitation and medical treatment** are made available to the authors.
 - Provide effective reparation, including **adequate compensation and appropriate measures of satisfaction**, to the authors and Mr. Neupane, if he is alive, for the violations suffered.
3. Furthermore, the Human Rights Committee recalled that, “the State party is also under an obligation to take steps to prevent the occurrence of similar violation in the future. In particular, the State party should ensure that: i) **its legislation allows for the criminal prosecution of those responsible for serious human rights violations such as torture, extrajudicial execution and enforced disappearance**; and ii) any enforced disappearances give rise to a prompt, impartial and effective investigation”.¹
4. The Human Rights Committee also declared that it “wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the

¹ Human Rights Committee (HRC), Case *Neupane v. Nepal*, Views of 21 July 2017, para. 12.

Committee's Views".² The Committee further requested Nepal to **publish its Views and disseminate them widely in the official languages of the State party.**³

5. More than six months have now elapsed since the adoption of the Views and the authors wish to submit to the Human Rights Committee, through its Special Rapporteur for Follow-up of Views, information on the lack of progress by the State party in undertaking measures to give effect to the Views concerned.

I. Activities Undertaken by the Authors and their Representatives to Establish a Dialogue with Nepalese Authorities

6. After the adoption of the Views, the authors made several attempts to contact the competent Nepalese authorities in order to trigger the implementation of the Committee's recommendations. In particular, the authors sent several letters and requests for meetings. Unfortunately, the level of implementation of the Committee's Views is still inexistent.
7. On 6 and 7 February 2018, the authors registered letters before various Nepalese authorities, respectively addressed to the Human Rights Unit of Office of the Prime Minister (Annexes No. 1 and 2), to the National Human Rights Commission (Annexes No. 3 and 4), to the Ministry of Peace and Reconstruction (Annexes No. 5 and 6), to the Ministry of Law Justice and Parliamentary Affairs, (Annexes No. 7 and 8); and to the Office of Attorney General Nepal (Annexes No. 9 and 10).
8. Notwithstanding the authors' efforts, **to date they have not received any formal response from the authorities concerned.** This suggests a general unwillingness of the State party to facilitate the implementation of the Views and to collaborate with the authors of the communication, as well as a callous indifference vis-à-vis their acute suffering.

II. The Translation of the Views in the Local Language and their Dissemination

9. With regard to the translation of the Committee's Views in Nepali, the authors addressed the Human Rights Unit of the Office of the Prime Minister (Annexes 1 and 2), asking to and disseminate the Views in the State party's official languages. The letter was registered on 6 February 2018 and assigned the registration number 7030.

² *Ibid.*, para. 13.

³ *Ibid.*

10. Similarly, on 7 February 2018, the authors registered a letter (Annexes 3 and 4) before the National Human Rights Commission (hereinafter, “NHRC”), inquiring about the role that the NHRC would play in the implementation of the Views and, in particular, in their translation and dissemination. The letter was registered with file number 577.
11. Another letter was registered on 6 February 2018 before the Ministry of Peace and Reconstruction (Annexes 5 and 6), calling on the recipient to take an active role in the translation in Nepali of the Views and their dissemination.
12. On 6 February 2018, the authors submitted another letter (Annexes 7 and 8) to the Ministry of Law, Justice and Parliamentary Affairs, inquiring on the role this Ministry could play in the translation and dissemination of the Views. The letter was assigned file number 348.
13. Finally, on 7 February 2018 a letter was registered also before the Office of the Attorney General (Annexes 9 and 10), explicitly calling on it to take the necessary measures to ensure the implementation of the Committee’s recommendations.
14. To date, **none of the authorities addressed has provided any update about steps taken to translate in Nepali the Committee’s Views and disseminate them.** It should be noted that if the State party does not translate and disseminate the Views, it will hamper the possibility for the Nepalese authorities and individuals and the society at large to be informed about the contents of the Human Rights Committee’s Views.
15. Despite all the efforts undertaken by the authors, at the time of writing, they **have not received any formal response from the authorities concerned and the Committee’s Views have not been translated nor disseminated.** Accordingly, the authors consider that the level of implementation of this measure shall be graded “D”.

III. The Lack of An Effective Investigation and Prosecution and Sanction of Those Responsible and the Absence of Information and Action to Locate, Exhume, Identify and Return Mr. Neupane’s Mortal Remains

- 16 The authors hold that **Nepal failed to adopt measures aiming at implementing the Committee’s recommendations** with regard to the carrying out of an **investigation and the prosecution and sanction of those responsible.** Moreover, despite the well-established case law of the Committee in the sense that transitional justice mechanisms cannot replace judicial remedies in cases of gross human rights violations, Nepal continues arguing that investigation into conflict-related crimes must be carried out by transitional justice bodies. The authors of the communication consider that this

interpretation openly runs against the Committee's recommendations and should therefore receive the grade "E".

- 17 The authors called on the competent Nepalese authorities to launch without delay an investigation into Mr. Neupane's enforced disappearance. **Neither the Office of the Attorney General nor the Ministry of Law and Justice reacted upon the authors' call.** Instead, as mentioned above, the general policy followed in Nepal is that conflict-related cases should fall under the mandate of the two transitional justice mechanisms (i.e. the Truth and Reconciliation Commission and the Commission of Investigation of Enforced Disappeared People).
- 18 Not only transitional justice mechanisms cannot replace ordinary judicial authorities when it comes to the carrying out investigations and prosecution and sanction of those responsible, but **in the specific case of the two Nepalese Commissions it is evident that no effective remedy whatsoever can be expected**, including in the case of the authors. Generally speaking, the **two Commissions have fallen short of international standards, both in the constitution and operation.**⁴ Moreover, **although their mandate has been extended one more year (i.e. until February 2019) it must be pointed out that they abundantly demonstrated their incapability and unwillingness to conduct investigations and that they continue operating on the basis of flawed legislation.**⁵ It is absolutely unlikely that the authors of the communication, who nevertheless reported the case of Mr. Neupane's enforced disappearance to both mechanisms (file No. 1804 before the Commission of Investigation of Enforced Disappeared People; and file No. 2447 before the Truth and Reconciliation Commission), will ever obtain any form of justice or redress from these Commissions.
- 19 Moreover, despite their proactive attempts of communication, Ms. Shanta Neupane and Nisha Neupane **did not receive any information on the progress of investigations concerning their loved one's disappearance and on the existence of any concrete plan to locate, exhume, identify and return his mortal remains** in the event of his death. The authors therefore hold that the status of enforcement of these measures recommended by the Committee should receive the grade "D".

⁴ International Commission of Jurists, *Nepal's Transitional Justice Process: Challenges and Future Strategy*, August 2017.
⁵ Among others, *Mere Extension of TRC, CIEDP Terms Inadequate; Human Rights Groups*, in *Myrepublica*, 14 February 2018, available at <http://www.myrepublica.com/news/36263/>; Bhattarai, *Justice Eludes Victims of Nepal's Civil War*, in *The Diplomat*, February 2018, available at <https://thediplomat.com/2018/02/justice-eludes-victims-of-nepals-civil-war/>; Bhandari, *Nepal's TJ Commissions Need Political Will, Not Just More Time*, in *Justiceinfo*, January 2018, available at: <https://www.justiceinfo.net/en/justice-reconciliation/36079-nepal-s-tj-commissions-need-political-will-not-just-more-time.html>; and *One Year Extension Won't Do: TRC Reps*, in *Kathmandu Post*, January 2018, available at <http://kathmandupost.ekantipur.com/news/2018-01-10/one-year-term-extension-wont-do-trc-reps.html>.

IV. The Lack of Any Form of Psychological and Medical Support in favour of the Authors

20 Ms. Shanta Neupane and Ms. Nisha Neupane expressly called on the Ministry of Peace and Reconstruction and on the Human Rights Unit of the Office of the Prime Minister to adopt without delay the necessary measures to ensure that they receive psychological and medical support due to the harm suffered. Unfortunately, at the time of writing they **did not receive any response in this regard and, to their knowledge, no measure whatsoever has been adopted to implement the Committee's recommendation.** In this light, the authors consider that the level of enforcement of this measure shall be graded "D".

V. The Failure to Adopt Measures of Satisfaction

21 Ms. Shanta Neupane and Nisha Neupane expressly called on the Ministry of Peace and Reconstruction and on the Human Rights Unit of the Office of the Prime Minister to adopt without delay the necessary measures of satisfaction, aiming at restoring their dignity and reputation as well as those of Mr. Danda Pani Neupane. In this regard, **the authors specifically requested public apologies and recognition of the State's international responsibility.** However, also in this case, at the time of writing **the authors did not receive any response and, to their knowledge, no measure whatsoever has been adopted to implement the Committee's recommendation.** Ms. Shanta Neupane and Nisha Neupane therefore consider that the level of enforcement of this measure must be graded "D".

VI. Adequate Compensation to the Authors

22 In order to receive adequate compensation, the authors registered letters before the competent authorities of the government of Nepal, **formulating a concrete request for compensation, based on the application of international standards in their case.** They pointed out that an adequate compensation for the harm suffered would amount to NRs 49,055,000 (approximately 490,550 US \$), in order to **encompass physical and mental harm; lost opportunities, including employment, education and social benefits; material damages and loss of earnings, including loss of earning potential; moral damage; costs required for legal or expert assistance, medicine and medical services, and psychological and social services.**

23 Unfortunately, at the time of writing, the authors **have not received any response from the Nepalese authorities concerned and they have not obtained any form of compensation for the harm suffered.** Ms. Shanta Neupane and Nisha Neupane

therefore consider that the level of enforcement of this measure must also be graded “D”.

VII. Domestic Legislation on Torture, Enforced Disappearance and Arbitrary Executions Remains at Odds with International Law

24 The authors specifically called on the Ministry of Law and Justice and on the Human Rights Unit of the Office of the Prime Minister, as well as on the NHRC to prompt the amendment of domestic legislation concerning torture, enforced disappearance and arbitrary executions, to bring it in line with international standards. Although a new Criminal Code has been adopted on 9 August 2017 (and will enter into force on 9 August 2018), **it does not codify extra-judiciary executions as separate offences and the definition of the crimes of torture and enforced disappearance contained therein is at odds with international law.**

A) Enforced Disappearance

25 Chapter 16 of the new Criminal Code concerns enforced disappearance. However, the **new legislation contains several provisions at odds with international standards.** First, the expression used in Nepali (i.e. *bepatta*) refers in general to persons gone “missing” and not necessarily subjected to “enforced disappearance”, hence somewhat diluting the criminal scope of the provision. Second, while pursuant to international law, the crime of enforced disappearance has three constitutive elements and one inherent consequence, the phrase used in the Nepalese criminal code departs from this scheme.

26 Pursuant to international law, the first constitutive element of an enforced disappearance is the deprivation of liberty of the victim against his or her will, in any form it takes place (e.g. abduction, arrest, kidnapping). An enforced disappearance must be perpetrated by State agents or persons or groups of persons acting with the tolerance, acquiescence or support of the State. The initial deprivation of liberty of the victim must be followed by the refusal to acknowledge that such deprivation of liberty took place or the concealment of the fate and whereabouts of the disappeared person. As a consequence, the victim is placed outside the protection of the law.

27 Art. 206(a) of the new Criminal Code unduly restricts the potential perpetrators to “persons of security personnel having authority by law to make arrest, investigation or enforcement of law”. Moreover, the constitutive element of denial that the deprivation of liberty took place or concealment of the fate and whereabouts of the disappeared (which is cumulative to the other constitutive elements) is ambiguously phrased as being alternative (“*or a refusal to let the person deprived of liberty to meet a judicial authority*”).

Art. 260(b) instead contemplates the possibility for “any person, organisation or group, whether organised or not” to perpetrate an enforced disappearance, therefore also departing from international law and using an extremely vague formula that dilutes the State’s responsibility. The sanction envisaged for enforced disappearance pursuant to Art. 206(7) is deprivation of liberty for a maximum of 15 years and a fine up to 500,000 NR (approximately 5000 US\$). If the victim of the enforced disappearance is a child or a woman, the sentence could be increased to 17 years in jail. **These penalties are hardly proportionate to the gravity of the crime** and do not meet international standards on the matter.

28 **Art. 208 unduly restricts the notion of reparation for victims of enforced disappearance**, by providing on the one hand that the disappeared person is entitled **solely to pecuniary compensation from the perpetrator** and only in case of surfacing alive. On the other hand, “heirs” of the disappeared person are entitled to mere compensation if the disappeared “is already dead” (no criteria is set to even calculate the said compensation). This provision departs from international law as it disregards the fact that “victim of enforced disappearance” is not only the disappeared but also any other person who suffers direct harm as a consequence of the disappearance. Moreover, reparation cannot be limited to pecuniary compensation (even less if made conditional to the fact that the perpetrator is identified, sentenced, and able to pay such compensation), but must encompass restitution, rehabilitation, satisfaction and guarantees of non-repetition. Finally, access to reparation cannot be made conditional to the fact that the victim is actually dead.

29 **Even more troubling is Art. 210, concerning the statute of limitations for enforced disappearance and establishing that “no complaint shall be entertained after the expiry of 6 months from the date of having knowledge of commission of the offence** or from the date of the disappeared person getting or being made public”. In its current formulation, **this provision is evidently at odds with international law and conducive to impunity**. Enforced disappearance is a crime under international law of continuous nature and it shall not be subjected to any statute of limitation. Pursuant to international law, if a statute of limitation is to be applied, it shall nevertheless be of long duration and proportionate to the extreme seriousness of the offence (hence 6 months are definitely not enough) and it shall commence from the moment when the offence ceases (and not from when the commission of the offence is known).

B) Torture

- 30 Art. 167 of the new Criminal Code enshrines the prohibition of torture. **The definition of the offence set forth therein is not line with international standards either.** First, **the notion of “victim” is unduly restricted to persons held in detention or otherwise in custody.** Second, while according to international law torture can be perpetrated by State agents or persons or groups of persons acting with the tolerance, acquiescence or support of the State, Art. 167(1) of the new Criminal Code **solely refers to agents who are “competent to investigate or implement the law, take anyone in control or hold anyone in custody or detention”.**
- 31 Furthermore, Art. 167(2) prescribes a sentence of **up to 5 years in jail or a fine of 50,000 NR (approximately 500 US\$) which is so evidently disproportionate to the gravity of the crime that sounds a mockery in the face of the acute suffering of the victims.**
- 32 Art. 169 **unduly restricts the notion of reparation for victims of torture to compensation paid by the perpetrator, disregarding all other measures of reparation (including rehabilitation, satisfaction and guarantee of non-recurrence) required under international law.** Moreover, the formula used in the provision is **overly vague by referring to “reasonable compensation”,** without determining what this actually means or setting criteria to calculate the amount to be awarded to the victim.
- 33 Art. 170 of the new Criminal Code sets forth the applicable **statute of limitation for criminal proceedings concerning torture and is completely at odds with international law by referring to “6 months from the date of the commission of the offence or from the date of release of the concerned person** from arrest, control, custody, detention, imprisonment”. The envisaged statute of limitation is not proportionate to the gravity of the crime and does not take into account the peculiarities of the offence and the exceptional challenges faced by victims, as well as the fact that the investigation for this crime shall be launched *ex officio* and not made conditional upon the submission of a complaint.
- 34 Moreover, other draft bills on enforced disappearance and torture that were discussed over the past years in Nepal were eventually discarded, hence leaving the existing loopholes in domestic civil and administrative legislation on these issues unaddressed. All in all, it is held that the level of enforcement by the State party of this measure must be graded “E”.

VIII. Conclusions and Requests

35 In the light of the above, referring to the criteria to assess the implementation of its Views adopted by the Human Rights Committee, Ms. Shanta Neupane and Nisha Neupane argue that in their case the actions and replies given by Nepal can be rated:

- “E” in relation to the obligation of the State party to conduct a **thorough investigation** into the facts and to **prosecute and sanction those responsible** for the crimes at stake.
- “D” in relation to the obligation to provide the authors with **detailed information about the outcomes of such the investigation**, and to **locate, exhume, identify and return Mr. Neupane’s mortal remains**.
- “D” in relation to the State party’s obligation to provide them with **adequate compensation** for the harm suffered.
- “D” in relation to the State party’s obligation to ensure that they receive the necessary and **adequate psychological rehabilitation and medical treatment**.
- “D” in relation to the State party’s obligation to provide **appropriate measures of satisfaction**.
- “D” in relation to the State party’s obligation to **translate the Committee’s Views into Nepal and to widely disseminate them**.
- “E” in relation to the State party’s obligation to prevent similar violations in the future by **amending its domestic legislation on enforced disappearance, torture and arbitrary executions**.

36. Pursuant to rule 101 of the Rules of Procedure of the Human Rights Committee, Ms. Shanta Neupane and Nisha Neupane call on the Special Rapporteur for Follow-up on Views to:

- Make such **contacts and take such actions as appropriate for the due performance** of the mandate. In particular:
 - a) Ensure that the Ministry of Peace and Reconstruction **locates Mr. Neupane and releases him, if he is still alive, or exhumes, identifies, and returns his mortal remains to his family**.
 - b) Ensure that the Attorney General **conducts investigations and initiates criminal proceedings against those responsible for the violations committed without delay and without further referral to transitional justice mechanisms**.

- c) Ensure that they promptly receive **psychological support and medical treatment** aiming at repairing the harm suffered, through the Ministry of Peace and Reconstruction and the Human Rights Unit of the Office of the Prime Minister.
- d) **Ensure** that they receive without delay compensation of NRs 49,055,000 (approximately 490,550 US\$) **that covers material and moral damages as spelled out above.**
- e) **Ensure** that they receive **public apologies** from Nepalese authorities, as a form of satisfaction.
- f) **Ensure** that the **Committee's Views are translated into Nepali without any further delay and widely disseminated.**
- g) Ensure that the Ministry of Law and Justice and the Attorney General take steps to amend domestic **criminal legislation on enforced disappearance, torture and arbitrary execution** and bring it in line with international human rights law.
 - **Report to the Human Rights Committee on the follow-up information** gathered on this case and make sure that the **Committee includes data on follow-up activities in its annual report;** and
 - Remain **actively seized of the matter.**

On behalf of Ms. Shanta Neupane and Nisha Neupane,

Philip Grant

Director of TRIAL International



Geneva, 21 February 2018

Annexes

1. Letter registered on 6 February 2018 before the Human Rights Unit Office of the Prime Minister (in Nepali).
2. Letter registered on 6 February 2018 before the Human Rights Unit Office of the Prime Minister (unofficial translation in English).
3. Letter registered on 7 February 2018 before the National Human Rights Commission (in Nepali).
4. Letter registered on 7 February 2018 before the National Human Rights Commission (unofficial translation in English).
5. Letter registered on 6 February 2018 before the Ministry of Peace and Reconstruction (in Nepali).
6. Letter registered on 6 February 2018 before the Ministry of Peace and Reconstruction (unofficial translation in English).
7. Letter registered on 6 February 2018 before the Ministry of Law, Justice and Parliamentary Affairs (in Nepali).
8. Letter registered on 6 February 2018 before the Ministry of Law, Justice and Parliamentary Affairs (unofficial translation in English).
9. Letter registered on 7 February 2018 before the Office of the Attorney General of Nepal (in Nepali).
10. Letter registered on 7 February 2018 before the Office of the Attorney General of Nepal (unofficial translation in English).